



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 252

[Docket DARS-2019-0045]

RIN 0750-AK55

Defense Federal Acquisition Regulation Supplement: Modification of DFARS Clause "Reporting and Payment of Royalties" (DFARS Case 2019-D018)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to update an existing DFARS clause to clarify instructions to contracting officers when completing the clause, pursuant to action taken by the Regulatory Reform Task Force.

DATES: Effective **[Insert date of publication in the FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Ms. Carrie Moore, telephone 571-372-6093.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is amending the DFARS to update the fill-in instructions for contracting officers contained in the clause at DFARS 252.227-7009, Reporting and Payment of Royalties. DFARS clause 252.227-7009 is available for use in all contracts that contain patent release and settlement agreements, license agreements, and/or assignments, executed by the Government, under which the Government acquires rights, and provide for payment of a running royalty. The clause addresses the terms and conditions for DoD reporting of annual royalties accrued under the contract and the contractor's resultant submission of a royalty payment request.

When applicable, DFARS 227.7009-4(d)(1) requires contracting officers to specify the name of the designated office within the applicable department or agency that is responsible for managing and reporting the extent of use of the licensed subject matter for the entire department or agency. The annual report generated by the designated office is provided to the contractor, in accordance with the clause. Depending on department or agency procedures, this report may be provided directly to the contractor by the designated office or to the contracting officer for further distribution.

Upon award of a contract that incorporates the DFARS clause, the contracting officer must fill in the clause with the name of the office or individual that will provide the annual report directly to the contractor. The clause includes parenthetical

instructions to contracting officers on the information required in the clause. Currently, these instructions reference the "procuring office" as the entity to be named in the clause, but this guidance is no longer accurate.

This rule updates the parenthetical guidance to direct contracting officers to insert the name of the designated office or contracting officer, in accordance with agency procedures. As a result, this rule intends to clarify for contractors the source of the report provided under the clause and avoid any miscommunication or misunderstanding between the Government and contractor when complying with the clause.

II. Discussion and Analysis

The modification of this DFARS text implements a recommendation from the DoD Regulatory Reform Task Force. On February 24, 2017, the President signed Executive Order (E.O.) 13777, "Enforcing the Regulatory Reform Agenda," which established a Federal policy "to alleviate unnecessary regulatory burdens" on the American people. In accordance with E.O. 13777, DoD established a Regulatory Reform Task Force to review and validate DoD regulations, including the DFARS. A public notice of the establishment of the DFARS Subgroup to the DoD Regulatory Reform Task Force, for the purpose of reviewing DFARS provisions and clauses, was published in the *Federal*

Register at 82 FR 35741 on August 1, 2017, and requested public input. One public comment was received on this clause.

Comment: The respondent advised that the clause is never used and should be deleted from the DFARS. Instead, the respondent advised that a policy statement that permits DoD to enter into settlement agreements where patent and copyright infringement is alleged by a third party owner of a patent or copyright would suffice, in lieu of the clause.

Response: DFARS clause 252.227-7009 serves as an agreement, through incorporation in the contract, between DoD and the contractor that, by execution of the contract, DoD and the contractor agree to the terms, conditions, and timeframes imposed for the reporting and payment of royalties, as they apply to the requirements and content of the specific contract. A general statement of policy does not fulfill the intent of this clause.

Additionally, the clause is available for use when applicable and necessary. As such, this clause is beneficial to DoD by facilitating a standard and uniform incorporation of more common terms and conditions associated with patent and license agreements and assignments into applicable contracts, without having to draft the language of these more common terms and conditions with each contract. This approach also ensures the same language is incorporated into each contract, which helps

DoD avoid miscommunications or misunderstanding and maintain consistency in negotiating such terms and conditions DoD-wide.

The DoD Task Force reviewed the requirements of DFARS clause 252.227-7009 and determined that only the instructions of the clause should be modified.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, including Commercially Available Off-The-Shelf Items

This proposed rule does not create any new provisions or clauses. The rule updates fill-in instructions to contracting officers within the existing clause. This rule does not change the applicability of the affected clause, which applies to those valued at or below the SAT, if applicable, but not to commercial or COTS items.

IV. Publication of This Final Rule for Public Comment Is Not Required by Statute

The statute that applies to the publication of the Federal Acquisition Regulation is Office of Federal Procurement Policy statute (codified at title 41 of the United States Code). Specifically, 41 U.S.C. 1707(a)(1) requires that a procurement policy, regulation, procedure or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of

the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because DoD is not issuing a new regulation; rather, this rule merely updates the instructions for contracting officers provided for in an existing clause.

V. Executive Orders 12866 and 13563

E.O.s 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

VI. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VII. Regulatory Flexibility Act

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 41 U.S.C. 1707(a)(1) (see section IV. of this preamble), the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) are not applicable. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

VI. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR part 252 is amended as follows:

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

1. The authority citation for part 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

252.227-7009 [Amended]

2. Amend section 252.227-7009 by—

- a. Removing the clause date of "(AUG 1984)" and adding "(SEP 2019)" in its place; and
- b. In paragraph (a), removing "(procuring office)" and adding "*[insert the Contracting Officer or the name of the designated office, in accordance with agency procedures]*" in its place.

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